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Supreme Court of the United States

OCTOBER TERM, 1963

No. 112

ZEREDER HARDY, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

On Writ of Certiorari To The
United States Court of Appeals
for the District of Columbia Circuit

BRIEF OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA AS AMICUS CURIAE

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This brief is filed by the Bar Association of the District of Columbia as *amicus curiae*, pursuant to the written consents of Petitioner and Respondent which are on file with the Court.

OPINION BELOW

No opinion in this case was filed by the Court below. The *per curiam* orders of the United States Court of Appeals for the District of Columbia Circuit are reproduced in the record at pp. 11, 15 and 22, and are not officially reported.

The attention of the Court is, however, directed to the contemporaneous opinion of the Court below in a similar case, in which that Court described the procedure it has adopted for the disposition of the questions presented by this case: *Ingram* v. *United States*, ___ U.S. App. D.C. ___, 315 F. 2d 29 (1962).

JURISDICTION

On February 16, 1962, Petitioner was sentenced in the United States District Court for the District of Columbia to concurrent prison sentences of up to five years following his conviction for violations of the narcotics laws. On February 19, 1962, the trial judge denied Petitioner's application for leave to appeal *in forma pauperis*. The application was renewed on March 16, 1962, in the United States Court of Appeals for the District of Columbia Circuit, the Chief Judge of which appointed counsel to represent Petitioner in connection with his application. Following a series of motions (described in greater detail in Petitioner's brief), counsel moved, on September 20, 1962, for a court order directing that Petitioner be furnished, at the expense of the United States, with a transcript of those portions of the trial proceedings not previously furnished, or, in the alternative, for an order denying him leave to appeal *in forma pauperis*.

On October 24, 1962, the Court of Appeals denied so much of the motion as requested the balance of the transcript of the trial proceedings at government expense. The Court took no action on the remainder of the motion. The petition for a writ of certiorari was filed on November 30, 1962, and was granted on April 29, 1963. Jurisdiction is based on 28 U.S.C. § 1254(1).

QUESTION PRESENTED

In direct appeals *in forma pauperis* from criminal convictions, does the practice of the U. S. Court of Appeals for the District of Columbia Circuit of furnishing appointed counsel with a partial transcript of the trial proceedings containing only the evidence presented by the Government, unless counsel can show a need for additional portions, comport with the Constitutional requirements of due process, with the standards of fairness and enlightenment expected of federal criminal procedures and with the direc-

tions of this Court as articulated in *Coppedge* v. *United States*, 369 U.S. 438 (1962)?

THE INTEREST OF THE BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA

Every practitioner of law, indeed every citizen of the United States, should be deeply concerned with the procedures under which criminal justice is administered in the federal courts. The problems of devising fair procedures are highlighted in the District of Columbia Circuit because of the unique jurisdiction of the federal courts sitting in the federal enclave. As these Courts are vested with exclusive jurisdiction to hear and determine all criminal cases arising in the District of Columbia, they must dispose of more than 10,000 cases per year. Approximately 1,300 of these concern felony charges and represent somewhat over 4% of all criminal cases considered by all of the federal district courts. But because of the nature of the crimes charged, encompasing all of the so-called "common law" offenses such as murder, rape, robbery, and assault, pleas of not guilty and jury trials are more common in this jurisdiction than in the courts of the remainder of the federal system, which are concerned almost exclusively with trying cases under the federal Criminal Code. As a corollary of these facts, a greater number of appeals is sought and obtained in this Circuit. Of approximately 600 appeals in criminal cases considered annually by all eleven United States Courts of Appeals, up to 20% are heard in the District of Columbia Circuit.

Statistics recently collected by the Chief Judge of the Court of Appeals for the District of Columbia Circuit indicate that criminal or quasi-criminal proceedings conducted in or before the District of Columbia Court of General Sessions, the United States District Court, the District of Columbia and United States Courts of Appeals,

the Juvenile Court, the Mental Health Commission, the Coroner, and the United States Commissioner generate an annual requirement of at least 10,000 assignments of counsel to represent indigents per year. Thus, the administration of *criminal* justice alone in this Circuit would appear to require every non-government lawyer admitted to the Bar and practicing in the District of Columbia to accept assignment in two cases each year. For many reasons the number of lawyers who are actually available to, and who do participate in the representation of indigents in criminal proceedings, is far smaller than the potential pool of 5,200 attorneys.

These facts highlight the ~~inefficiency~~ inefficacy of present practices and procedures in the local courts and, to the extent that these courts serve as models for their sister tribunals in the federal system, raise serious questions about the administration of criminal justice generally throughout the federal system. As the largest Bar Association in the District of Columbia, with some 3,600 active members, this Association is deeply concerned with the utilization of donated lawyers' services on behalf of indigents. The Association similarly has a particular obligation to its members and to the Courts to devise methods whereby lawyers' efforts can most effectivly and efficiently be used in the quest for equal justice for all who apepar in court faced with criminal charges.

The question presented by this case focuses upon a single onerous and, in the Association's view, unnecessary, procedure adopted by the United States Court of Appeals for the District of Columbia Circuit—a procedure whereby counsel appointed to represent the indigent appellant gets a trial transcript—if at all—only in bits and pieces, and then only by making a showing which the abscence of a transcript makes difficult or impossible. As this practice vitally affects the manner in which the local bar can dis-

charge its obligations under existing procedures for the assignment of counsel to represent indigents—quite aside from its effects on the administration of criminal justice—the Association feels it should express its views to the Court.

SUMMARY OF ARGUMENT

The current practice of the Court of Appeals for the District of Columbia Circuit, of furnishing counsel appointed to represent indigents seeking leave to appeal *in forma pauperis* with a partial trial transcript containing only the testimony and evidence presented by the government, unless counsel can show a need for additional portions, does not comport with the standards of fairness and due process demanded in federal criminal procedures or with the commands of this Court as recently enunciated in *Coppedge* v. *United States*, 369 U.S. 438 (1962).

The Bar Association of the District of Columbia is deeply concerned with the serious constitutional questions necessarily raised by a practice which denies to a convicted defendant, by reason of indigency alone, the same complete record of trial proceedings which otherwise would automatically be available. Members of the Association frequently called upon to represent such clients cannot give to the indigent defendant the full measure of his right to counsel without a complete transcript. In spite of the extra time and energy counsel may expend in an effort to reconstruct portions of the trial not transcribed, the task is an impossible one and should not be imposed. And appointed counsel cannot safely discharge his obligation of investigating all possible grounds for appeal, in view of the complexities of modern criminal law, without knowing precisely what took place at trial.

Finally, it seems only appropriate that the cost of providing a full transcript be shared by society without im-

posing on appointed counsel the unnecessary burden and wasteful effort involved in attempting to recreate an appellate record from the fallible memories of interested trial participants.

ARGUMENT

THE COURT OF APPEALS SHOULD BE REQUIRED AS A MATTER OF COURSE TO FURNISH A COMPLETE TRIAL TRANSCRIPT TO AN INDIGENT DEFENDANT SEEKING LEAVE TO APPEAL A CRIMINAL CONVICTION IN FORMA PAUPERIS

By now this Court is familiar with the successive hurdles which the indigent defendant in a criminal case must overcome en route from sentencing in the District Court to a decision *on the merits* by the Court of Appeals. See *Coppedge* v. *United States*, 369 U.S. 438 (1962). In an apparent desire to fix the procedural ground rules governing *in forma pauperis* appeals, following *Griffin* v. *Illinois*, 351 U.S. 12 (1956), this Court in *Coppedge* went "beyond the corners of 28 U.S.C. § 1915" and spelled out in elementary detail the procedures to be used and the standards to be applied "to assure equality of consideration for all litigants"—whether their criminal appeals be prepaid or *in forma pauperis*. Nevertheless this Court is now faced still again with the task of instructing the Court of Appeals that its application of *Coppedge* is inadequate.

With respect to the merits of petitioner's case, we are satisfied that the matter will be more than adequately presented to this Court by the parties.[1] We therefore focus our remarks on the effect of the Court of Appeals' post-

[1] Suffice it to say that the ruling of the court below, as articulated in *Ingram* v. *United States*, ____ U.S. App. D.C. ____, 313 F. 2d 29 (1962), represents at best a truncated reading of the language and an insensitivity to the spirit of *Coppedge;* at worst, the *Hardy-Ingram* procedure of granting fragmented transcripts defies the burden of proof strictures laid down with particularity in *Coppedge*. *Coppedge* v. *United States*, 369 U.S. at 447-48.

Coppedge modus operandi on those attorneys in the District of Columbia who have in the past given and continue to give so generously of their time and energy in the handling of *in forma pauperis* appeals.

This Court in *Coppedge* evidenced its deep sensitivity to, and clear understanding of, the difficulties facing the indigent appellant. The Court stated:

> "Particularly since litigants *in forma pauperis* may, in the trial court, have suffered disadvantages in the defense of their cases inherent in their impecunious condition, is appellate review of their cases any less searching than that accorded paid appeals inappropriate." *Coppedge* v. *United States*, 369 U.S. at 450.

And this Court put the Court of Appeals on notice that fragmented consideration of indigent appeals was, to say the least, unsatisfactory. After noting that "[d]elay in the final judgment of conviction, including its appellate review, unquestionably erodes the efficacy of law enforcement," *id.* at 449, the Court found:

> "[S]tatistics demonstrate the inevitable delay that surrounds a procedure in which the courts give piecemeal attention to the series of motions that indigents must make before final adjudication of the merits of their cases is reached. Delays described in years between trial and final decision in criminal cases are the unhappy result of separate considerations of motions for the appointment of counsel, for the preparation of a transcript of the trial proceedings and, ultimately, for the leave to appeal *in forma pauperis*." *Id.* at 450.

It was left to the concurrence in *Coppedge* to spell out what was implicit in the Court's articulation of the burden of proof, the Court's visible concern for the inherent dis-

advantages suffered by indigents and the Court's distaste for delay. Justice Stewart urged:

> "[E]ach Court of Appeals might well consider whether its task could not be more expeditiously and responsibly performed by simply granting applications to appeal from criminal convictions *in forma pauperis* as a matter of course, and appointing counsel to brief and argue each case on the merits. The Government would then be free in any case to file before argument a motion to dismiss the appeal as frivolous, as every appellee is always free to do. In the absence of such a motion an appeal which after argument appeared clearly without merit could be expeditiously disposed of by summary affirmance, in the secure knowledge that all the issues had been fully canvassed. This procedure, it seems to me, would obviate the many difficulties which, as the present case shows, the complicated two-step system is all too likely to produce." *Id.* at 458.

As a predicate to the foregoing suggestion, the concurrence noted:

> "It is a serious imposition upon appointed counsel to require the dissipation of energy and time in preliminary skirmishing." *Id.* at 457.

But it is precisely this "preliminary skirmishing" that the Court below has now elevated to a procedural rejuirement. Although in the instant case no opinion or per curiam memorandum was filed, the Court of Appeals subsequently detailed the procedural steps it believed would satisfy *Coppedge*. In *Ingram* v. *United States*, ____ U.S. App. D.C. at ____, 315 F. 2d at 30-31, the court below stated:

> "Accordingly, we have devised the following implementing procedure: when a *pro se* petition is filed, upon direct appeal from judgment of conviction, and the claims of error stated therein (e.g., 'insufficiency of evidence,' 'unlawful search and seizure,') are so conclusory in nature that 'their substance cannot adequately be ascertained,' counsel will be appointed and,

simultaneously, the portion of the transcript of proceedings which relates to the conclusory allegations will be ordered so that appointed counsel may determine their merit. Of course, counsel will not be limited to the transcript initially allowed if he can in good conscience advance other claims of error requiring additional portions of the transcript.

"By this procedure much of the attributed 'inevitable delay' caused by 'piecemeal attention to the series of motions that indigents must make' is ended. It is based on our belief that the Coppedge opinion does not require a complete transcript to be prepared in every case, and that to obtain even a partial transcript some showing of error, if only vague and conclusory, must be made."

In urging that this Court hold (1) that the foregoing interpretation of *Coppedge* is incorrect and (2) that full trial transcripts must be furnished at government expense as a matter of course to each defendant seeking leave to appeal his conviction *in forma pauperis*, we can do no better than to direct this Court's attention to Chapter IV of the *Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice*, submitted February 25, 1963 (hereinafter REPORT), and to the report of a special committee of the Junior Bar Section of the Bar Association of the District of Columbia, cited at REPORT, c.IV, p. 118, n.30, and included as an appendix to this Brief. See also Boskey, *The Right to Counsel in Appellate Proceedings*, 45 MINN. L. REV. 783, 791-94, 802 (1961).

After concluding on the basis of a statistical examination of the federal criminal dockets—including the appellate criminal docket in the Court below—that abandoning the *in forma pauperis* "screening" process (essentially the suggestion in the *Coppedge* concurrence) would not in fact overburden either the appellate bench or the Federal Treasury (see REPORT, pp. 94-96, 104-110, 115), the REPORT noted

the adverse effects on appointed counsel and their indigent clients of perpetuation of the "screening" process.

> "Since the justification of the 'screening' procedures presently employed in the federal courts must rest upon their supposed economies of money and effort, it becomes pertinent to examine in some detail the practical operation of the system. The Committee believes that the alleged economies are largely illusory and that the screening procedures produce other consequences imperiling the equity and efficiency of the administration of federal justice in the appellate area." *Id.* at 99.
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> . . . . . .
>
> "If the papers presented to the appellate court establish defendant's right to appeal *in forma pauperis* the application should be granted. Often, however, the situation is one in which the papers submitted by the defendant *pro se* are not adequate to permit the court of appeals to come to a decision. At least since the decision of *Johnson* v. *United States* in 1957, it has been clear that the court is under obligation to appoint counsel in defendant's behalf and that counsel must be permitted to advance reasons why leave to appeal should be granted. Counsel appointed in such a case receives no compensation for his services and is often confronted by difficult and time-consuming obligations. Since the lawyer appointed in the court of appeals is not likely to have participated in the trial of the case, he will ordinarily lack personal knowledge of the occurrences at trial. He must, therefore, seek to provide some basis to determine whether defendant's points are frivolous or possess substance, such as entering into an agreed statement of facts with the prosecutor, requesting the court reporter to read back all or portions of the shorthand notes of the trial, or inspecting the notes of the trial judge if such exist and are made available. 'Such efforts are apt to be incredibly time-consuming and frustrating, and sometimes may arouse in counsel a feeling that he would be well advised to avoid future assignments of appellate *in forma pauperis* work. But worse than that, in many instances

these efforts will be wholly unsatisfactory as a means of safeguarding the defendant's rights.'

"Often counsel will conclude that the only 'appropriate means' of determining the character of defendant's grounds for appeal is a trial transcript. A motion to this effect with accompanying memorandum must be filed. Typically the request will be opposed by the Government. In many cases the transcript, even when supplied, will be only partial, thereby depriving defendant of the possibility of reversal on the ground that the record contains 'plain error' of which the defendant was unaware and of which he might have had the benefit had he possessed means adequate to purchase a complete transcript." *Id at* 101.

. . . . . .

"It will be observed, first, that the existing procedures are enormously expensive in time and effort. The efforts of assigned counsel to search out, in the absence of an adequate transcript of the trial, a sufficient basis for granting leave to appeal is wasteful not only of the lawyer's time, but that of the officials whom he must contact and interview for this purpose. Every application for leave to appeal involves the potential of at least two judicial proceedings, one in the district court and one in the court of appeal, even when a further hearing on the merits is never reached. In some situations, however, many more than two proceedings occur, some leading to full-scale opinions—again, without the merits of the appeal being reached. Perhaps the most oppressive burdens of time and effort fall on assigned counsel. In the District of Columbia alone, 108 appointments of counsel were made in these cases in 1958; and many other appointments have been made in other circuits. It is not far from the truth to say that the federal system seeks to avoid the expenses of supplying transcripts to all financially disadvantaged defendants desiring to appeal by shifting the burdens to lawyers required to serve without compensation or reimbursement of expenses. Nor can the system be defended as an effective device to protect the legitimate

interests of convicted defendants. As pointed out above, the system operates at various points to provide the defendant required to invoke the *forma pauperis* procedures with less than equal opportunities to invoke full appellate review." *Id.* at 102.

. . . . . .

"The Committee believes that proper evaluation of comparative costs requires that attention be directed to the 'hidden costs' of the present system. First there are the costs in judicial time in the district courts and courts of appeals, just noted, that result from the administration of the present system. Second are the costs in the time of public officials required to be interviewed by assigned counsel in his effort to establish a record or to justify the ordering of a transcript in proceedings involving leave to appeal *in forma pauperis*. Third are the costs of time, effort, and expense of assigned counsel. The present system is able to function at all only by shifting a large part of the burdens of the system on lawyers who are required to serve without compensation or reimbursement." *Id.* at 114.

We believe the reasoning of the REPORT to be cogent and the conclusion to be correct. We urge this Court now to exercise its supervisory powers and to direct, at a minimum, that a full trial transcript be prepared automatically upon the filing of a notice of appeal and application for leave to appeal *in forma pauperis*.[2]

One further point must be made in urging that a complete trial transcript be provided as a matter of course in

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[2] The cost factor in the procedure we urge this Court to adopt is, of course, not to be overlooked. But also, of course, that factor cannot be allowed to stand in the way of the proper—of the Constitutional—administration of justice. The problem of costs is explored in greater detail in Section 3 of the Junior Bar Section's Report, Appendix pp. A-8—A-13, *infra*. It was the conclusion of the committee preparing that Report that the "automatic" allowance of full transcripts would not appreciably raise the *total* cost of criminal appeals—and might even result in the eventual conservation of both funds and judicial time.

every indigent's direct appeal of a judgment of conviction. On the basis of our experience as appointed counsel, we believe strongly that providing a trial transcript in every case will significantly reduce the number of collateral attack proceedings under 28 U.S.C. 2255, habeas corpus, or coram nobis. (See REPORT, pp. 109-110, 114.) And even if the number of collateral proceedings is not significantly reduced by automatically providing transcripts (copies of which would have to be filed with the records of the court, see 28 U.S.C. 753(b) ¶ 4), it is clear in our judgment that the amount of time spent by the bench, the bar and the prosecutor in disposing of such collateral actions will be sharply curtailed and that such actions will be disposed of with far greater confidence that a just result has been properly achieved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the order of the court below dated October 24, 1962 should be vacated and the cause remanded to that court with instructions that it direct Respondent to furnish Petitioner a stenographic transcript of the proceedings in the trial court as yet not transcribed.

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APPENDIX

APPENDIX

Report of a Special Committee of the Junior Bar Section of the Bar Association of the District of Columbia to the Attorney General's Committee on Poverty and the Administration of Criminal Justice.

Peter D. Ehrenhaft, Chairman
Daniel J. Freed, ex officio
Louis M. Kaplan, David Rubin,
Richard S. Salzman, Daniel M. Singer

January 15, 1963

APPEALS

The Supreme Court has stated that in federal criminal cases, an appeal from a judgment of conviction is a "matter of right." *Coppedge* v. *United States*, 369 U.S. 438 (1962). The decision in *Coppedge* culminated a series of opinions reflecting the Court's increasing concern with the obstacles faced by poor persons seeking to exercise their "right" to appeal in the federal courts.[1] As there stated the Court has sought to provide the lower federal courts with a "usable standard" for meeting the two-pronged problem of discouraging frivolous litigation in crowded courts while avoiding "invidious discrimination" against indigent litigants.

The question of discrimination has arisen in the light of provisions of the Judicial Code and Federal Rules of Criminal Procedure which, in effect, modify the poor person's "right" to appeal. Financial requirements are an integral part of the current rules concerning the docketing of an appeal in the Court of Appeals, preparing a transcript

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[1] The cases are collected in footnote 1 of the Court's opinion. See also note 13, collecting and comparing cases which arose in the state courts.

of the trial proceedings and furnishing a record on appeal. The appellant with funds can meet these requirements and, upon satisfaction of other procedural requisites, can, without further court action, appear before the Court on the merits of his appeal. The indigent, on the other hand, must apply for a Court order directing that the costs of prosecuting the appeal be borne by the United States. In addition, the indigent will generally be required to petition the Court for an appointed counsel.

The successive consideration of motions for the appointment of counsel, for the preparation of a transcript and for leave to proceed on appeal without payment of costs has resulted in substantial delays in the disposition of appeals *in forma pauperis*. More seriously, this practice has subjected indigents' cases to a fragmented screening process not applied to the cases of appellants able to meet the costs of perfecting their appellate rights. In *Coppedge*, the Supreme Court strongly suggested that constitutional considerations of equal protection of the laws and due process would require invalidation of procedures subjecting the appeals of the poor to more exacting scrutiny than that accorded the affluent. Indeed, it added the thought that since indigent litigants, due to their lack of resources, generally experience greater difficulties in the defense of their cases at the trial level, burdening their rights to secure appellate review was "particularly inappropriate." The majority intimated and the concurring Justices explicitly stated that a system of completely "automatic" appeals would both meet the constitutional problem and, at the same time, save time and money now spent in screening indigents' cases. The opinion of the Court in *Coppedge* cited statistics to support the propositions that *in forma pauperis* criminal appeals are not, as a class, less likely to present legal questions meriting appellate review than cases in which the appellant has paid the costs on appeal, and that the current fragmented processing of appeals *in*

forma pauperis unduly delays the final disposition of some cases as much as six years.[2]

The statistics cited by the Supreme Court in *Coppedge* are, of course, illustrative only. On the issue of the frivolity of i.f.p. litigation as a class, the figures are taken from the single jurisdiction, the District of Columbia Circuit, in which the problem of *in forma pauperis* criminal appeals has received the greatest attention.[3] However, this data was not the product of any systematic collection of facts. The truth of the matter is that adequate statistics for studying the disposition of indigents' appeals and for determining the adequacy of current practices—or alternatives—are not presently available. Neither the courts nor the Department of Justice maintain systematized records of the number of persons seeking leave to proceed *in forma pauperis*, the number of persons granted such leave, the costs—in terms of money and the time of counsel, United States Attorneys, judicial personnel and others—expended under the current practice, or the total time elapsed for the disposition of criminal cases *in forma pauperis* as compared to cases in which the defendant pays costs. Without

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[2] The case of *Coppedge*, himself, is illustrative. Indicted in June 1958, it was only in December 1962 that he reached the stage of filing a petition in the Supreme Court for a writ of certiorari to review on the merits the Court of Appeals' affirmance of his conviction.

[3] The unique jurisdiction of the federal courts in the District of Columbia accounts for this fact. Thus, the United States District Court for the District of Columbia does not hear the most criminal cases of all federal district courts, since misdemeanors and petty offenses are tried in a municipal court, whereas other district courts do try all such cases not heard by a United States Commissioner with jurisdiction only over petty offenses. On the other hand, trials of "common law felonies" such as murder, arson, rape and robbery are heard with regularity in the U.S.D.C.D.C., whereas other district courts are concerned almost entirely with the "federal crimes" ranging from sabotage and narcotics smuggling to tax evasion and illegal immigration. Disposition of the latter type of case by guilty pleas is more likely than in the former type, with a resulting lower number of criminal appeals arising from the courts considering primarily the usual federal crimes.

such statistics it is difficult to determine whether changes in present practices would cost more or less or the extent to which changes would expedite appellate review of all criminal cases. A thorough study of the problem, based on, say, five years' experience in the District of Columbia and one or two other Circuits, would appear to be money well spent.

Nevertheless, certain facts are presently available which support the view suggested in *Coppedge* that a system of "automatic" appeals is not only the most just but also the most economical in the long run. The study of criminal appeals over an 18-month period conducted by Chief Judge Bazelon of the Court of Appeals for the District of Columbia Circuit, was cited by the Supreme Court to demonstrate that (1) The volume of direct criminal appeals, even in the federal jurisdiction accounting for almost one-third of all criminal appeals now being heard, is not very large. In his study, Judge Bazelon found that the Court had heard 86 criminal appeals in 15 months. A more recent study, conducted by the Clerk of the same Court, found that in the fiscal year 1961, the Court disposed of 84 criminal appeals, including 7 which the Court merely docketed and then dismissed for lack of prosecution;[4] (2) Appeals of indigents result in reversals, divided affirmances and unanimous affirmances in approximately the same ratio as appeals by appellants paying costs. In addition, the Supreme Court cited examples based on its own study of the numerous steps required to dispose of some of the criminal cases in which it had addressed itself to the *in forma pauperis* problem,[5] and suggested that the costs of the present systems in terms of time and effort, as well as in public funds,

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[4] See also chart #5, *infra*, compiling an informal study by a Washington attorney in preparing an article on a related subject.

[5] See note 17, 369 U.S. at 452, describing the histories of the *Johnson*, *Farley* and *Ellis* cases.

can be considerable and perhaps even greater than those necessary to support automatic appeals.

The committee has attempted to utilize additional available information to determine the extent to which these propositions are substantiated.

1. **The volume of criminal appeals in the federal courts is not large.**

The various informal studies considered by the committee, such as the one of Judge Bazelon cited in *Coppedge*, indicate that the number of criminal appeals in the federal courts is considerably smaller than is commonly believed. This indication is further substantiated by statistics taken from two other, more comprehensive sources: the annual reports of United States Attorneys of the Department of Justice and of the Director of the Administrative Office of the United States Courts. The figures from these reports, tabulated in an appendix to this chapter, show a greater volume of litigation than is reported by the ad hoc studies of Judge Bazelon, the Clerk of the D. C. Circuit and Mr. Boskey; and the United States Attorneys reports indicate higher figures than those of the Administrative Office. Account for these disparities lies in a lack of uniform statistical criteria, e.g., variable inclusion as "terminated" criminal "appeals" of denials of leave to appeal *in forma pauperis*, and of appeals from denials of post conviction collateral motions, such as habeas corpus or under 28 U.S.C. § 2255.[8] These factors, alone, suggest the need for a better

[8] For example, as will be noted from chart 2, the Administrative Office of the Courts Report for fiscal year 1961 lists 91 terminated criminal appeals by the D. C. Circuit. This was the figure submitted by the Clerk of that Court. However, his personal study of this problem revealed that this number included five appeals from orders denying relief under 28 U.S.C. § 2255, one from an order denying a writ of error coram nobis and one from an order revoking probation. The number of 84 "terminated" appeals does not include terminations effected, from the would-be appellants' point of view, by denials of leave to appeal *in forma pauperis*.

continuing and uniform statistical service.

But allowing for the widest margins of error, and recognizing that these statistics tend to inflate the actual number of cases considered by the courts, the volume of direct criminal appeals remains both surprisingly constant and relatively small. They reveal that we are speaking here of a problem which, under current practices, embraces less than 800 cases in the entire federal court system per year. Further, if the recommendations of the committee were adopted, providing for the automatic appellate review of all criminal convictions in which appeals are likely to be sought, the number of such cases could, conceivably, increase only four or five times the present total. This computation assumes that no defendant found guilty after trial would be deterred from appealing his conviction on such various grounds as his appeal could delay completion of service of his sentence, his sentence will have expired before completion of appellate review, or a mere disinclination to litigate the matter further. But even assuming that *every* defendant found guilty after trial would seek to perfect a complete appeal at government expense, we are still speaking of less than 3500 cases throughout the United States per year, and of a figure representing less than 10% of all the persons against whom original criminal proceedings in a federal court are brought each year.[7]

2. Indigents' appeals are no less meritorious than "paid appeals."

It is clear that underlying the present system of piecemeal appellate consideration of criminal appeals *in forma pauperis* is the thought that an indigent, with no personal

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[7] As the disparity on charts 1 and 2 between criminal "cases" and criminal "defendants" terminated indicates, many "cases" cover more than one defendant. Thus, too the number of appeals would be smaller than the number of "defendants" and would be more closely linked to the number of "cases" terminated with convictions after trial.

fortune at stake in continuing litigation, is more likely to abuse his right of appeal than the person who must pay for proceeding further. The existing procedure is intended to provide the brake to frivolous litigation by indigents which it is supposed that financial considerations impose on the more affluent. Aside from the doubtful constitutionality of that thesis, the committee questions its truth in fact. Recognizing that an appeal will arise only out of a *contested* indictment, it seems reasonable to believe that most persons able to pay therefor, having lost at the trial level and facing imprisonment or even execution, will continue litigating as long as they have any hope of securing reversal of their convictions. Their hopes may give rise to appeals as meritorious or as frivolous as indigents'. Money would appear to be a minor consideration at that juncture.

In fact, Judge Bazelon's study found no relation between i.f.p. appeals and their ultimate disposition, that differed substantially from the disposition of paid appeals. The Clerk of the D. C. Circuit found, in his study, that of 84 appeals in fiscal 1961, 22 were paid, 7 were docketed by the Court and dismissed for failure of prosecution and 55 were allowed *in forma pauperis* either by the District Court or the Court of Appeals. His study found, further, that of the 22 paid appeals, 16 were affirmed, 3 reversed, 1 dismissed without prejudice, 1 dismissed by the appellant and 1 dismissed as frivolous by the Court. The Administrative Office Report for the same year notes that 57 criminal appeals were affirmed, 2 dismissed, 10 reversed and 2 received other disposition. Although some errors in these computations have been noted, the figures are useful to show that the approximate ratio of 1 reversal to every 6 affirmances among the paid appeals was similar to that in indigents' cases, in which the 7 remaining reversals must have been ordered to a maximum of 48 affirmances and dismissals.

It may be assumed that if appeals were heard "automati-

cally" the ratio of reversals to affirmances and dismissals would be increased. However, even if it were to reach a proportion of 1:20, a three fold "improvement" over current practice, it is the view of the committee that the federal courts should not perpetuate a system that prevents hearing a man with as much as a 5% chance to secure vindication of his rights merely because he is poor. As the Supreme Court pointed out in *Coppedge*, the indigent has probably suffered increased disabilities at the trial level directly related to his poverty. It is improper to increase his burden in securing appellate review, when he probably has the greatest need for it.

3. The cost of automatic appeals will not be substantially greater than the cost of the present system.

The "cost" of appellate review is difficult to define, much less determine with accuracy. Broadly speaking, however, the concept should include the out-of-pocket expenses of the defendant for perfecting his appeal, including the price of a trial transcript and docketing fees, as well as the salaries and time of court reporters, defense and appellate counsel, government attorneys, the court's staff and, of course, the judges who hear the case. The present system of dealing with indigents' cases would appear to take inadequate account of every factor other than the first which, in an i.f.p. case is borne by the government. As is revealed by the histories of *Coppedge* and the other cases cited by the Court in its opinion in that case, an inordinate consumption of the time of counsel, court personnel and judges is required by the existing "screening" process, the aim of which is to save funds but which, in fact, appears to save them only in the area of transcripts and docketing fees. The time devoted to the consideration of each of the required steps in those and comparable cases could, it seems to the committee, have been far better spent in reviewing on the merits the appeals of all those who sought to appeal

despite the added cost of transcripts. This is particularly true since, as was reported to Mr. Boskey by most of his correspondents, a majority of the applications to take direct appeals *in forma pauperis* is allowed after all of the preliminary screening is completed.

The principal direct expense to the government arising out of appeals *in forma pauperis* is the cost of transcribing verbatim records of the trial proceedings under review.[8] The disposition of most criminal appeals requires a review of such a transcript, and the cost of transcribing proceedings runs to approximately $1 per page.[9] However, only a portion of that dollar is fairly attributed to the defendant, since the government will generally purchase a transcript in the event a defendant purchases his own for purposes of appeal. The cost of a complete transcript naturally varies with the length of the trial. As chart 2 indicates, a vast majority of all criminal trials is concluded in less than 3 days. A transcript of a three-day trial will generally cost less than $200 to prepare, and the Administrative Office of the United States Courts reports that a large majority of the transcripts ordered in i.f.p. appeals cost less than $100—not including the additional cost of the

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[8] A further, sometimes major, cost is that of preparing and printing a joint appendix of relevant portions of the transcript and record. The Clerk of the District of Columbia Circuit has reported that in *in forma pauperis* appeals, about two-thirds of the cost of preparing the joint appendix should be, and for accounting purposes is, attributed to the appellant. However, many techniques can be used to minimize the cost of reproducing the relevant portions of the record for the use of the Court—once the transcript is available.

[9] The cost varies from jurisdiction to jurisdiction. The $1 per page fee would pay for 3 copies in the District of Columbia—1 for the appellant, 1 for the government and 1 for the court. The latter is, pursuant to 28 U.S.C. § 753(b), a free copy which the court reporter must deliver to the court when he transcribes any record for a litigant. The court reporter is also obligated by the cited statute, to transcribe and deliver free of charge for the court's records, a transcript of all arraignments and sentencing procedures.

government attorney's copy. During fiscal 1962 the total cost of all transcripts for i.f.p appeals—including some collateral appeals—was $110,000, although this sum included a single $22,000 item for the transcript of a trial which took almost a year to complete. In fiscal 1961, 330 transcripts were ordered throughout the U.S. for a total cost of $83,000. The same office has budgeted $200,000 for transcripts for fiscal year 1963 in the belief that following *Coppedge* many more transcripts will be ordered. In fact, requests for transcripts have been running ahead of last year, but whether $200,000 will be expended remains to be seen.[10]

In an effort to reduce the fragmented consideration of i.f.p. appeals, and in consonance with its understanding of the requirements—if not the intentions—of *Coppedge*, the Court of Appeals for the District of Columbia Circuit has announced that it will generally order at least a partial transcript automatically for an indigent seeking leave to appeal *in forma pauperis*. The parts to be ordered are to be limited to those relating to the claims of error made by the indigent in his application for leave to appeal. The soundness of this rule appears questionable, since it is unlikely that most laymen will be able to recognize, much less articulate, the claims to be made that would merit an appellate court's attention. The attorneys appointed by the court to represent such appellants are then also burdened with a limited record of the trial they are asked to review for error and are, in effect, still thrown back to the time consuming task of personal investigation by interviews with the participants in the trial in order to fulfill their

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[10] These sums should also be compared to the amounts spent by the administrative agencies of the government for transcribing protracted hearings and which, on occasion, reach as many as 50,000 pages. It is the committee's opinion that the transcription of criminal cases merits a higher priority in the allocation of funds for transcription purposes.

responsibilities. Such a restrictive view of the requirements of *Coppedge* has already led to two divided decisions by the Court, one of which is currently pending before the Supreme Court on petition for certiorari.[11]

Suggestions that transcripts costing $100 or less be automatically granted, $200 or less be granted with the approval of the U.S. Attorney and those costing more be granted at court order are, of course, but short-hand expedients for most cases, though a blatant denial of equal protection to the defendant who has undergone a long trial.

In this connection, two additional facts should be noted. First, present law requires and finances the presence of a court reporter and the verbatim recording of all proceedings in a federal criminal trial. Thus, the question of "transcripts" for indigents is really directed only at the transcription of existing records into typed or other comparable, usable form. The principal costs of a transcript—securing a trained reporter and the actual recording of the proceedings—are already met out of the appropriated funds from which the court reporters are paid. Second, although the transcription of records is but a part of the process of preparing a transcript, it is a time-consuming one. It is so much so that the court reporters throughout the Nation have consistently failed to comply with 28 U.S.C. § 753(b) requiring them to transcribe and file *all* proceedings concerning pleas and sentencing, and the Administrative Office of the Courts has been unable to enforce this provision. Thus an expanded requirement for automatic transcription of trial records will undoubtedly entail not only the added per page cost of such transcripts, but the salaries of additional reporters and/or stenographers and typists capable of reading and typing a reporter's notes of the trial. The

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[11] *Hardy* v. *United States*, Misc. No. 1834, decided October 24, 1962, pending on cert. as No. 783 Misc. October Term 1962; *Ingram* v. *United States*, Misc. No. 1797, decided Dec. 6, 1962.

committee has no statistics from which the cost of such a program could be projected. However, it suggests as a useful area of study the cost of the administration of military justice under The Uniform Code of Military Justice. The Code requires the verbatim recording and transcription of all prosecutions resulting in sentences of felony proportions and for automatic appeal at government expense of such cases to a three member Board of Review. As the uniformed services conduct almost as many trials by general court martial each year as all the civilian federal courts combined, and the approximately 10 Boards of Review consider many more cases than the 11 federal Circuit Courts of Appeal,[12] this existing Congressionally enacted procedure merits close study and comparison.

The automatic availability of full transcripts for all persons seeking to appeal their convictions will, it is believed, have the following additional, possibly money-saving results:

1. The time of all persons who must now be consulted by appellate counsel in their search for error to present for review will no longer be taken for this purpose.

2. The time of counsel themselves—be they the presently uncompensated, court appointees or members of a future public defender staff—will be saved for more useful purposes, such as the better preparation of each case and the handling of more cases.

3. The availability of full trial transcripts and the knowledge that they have once been reviewed by an appellate court may reduce both the number of, and certainly should reduce the time consumed in considering, petitions for post-

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[12] See chart 4, and compare charts 3 and 5.

conviction relief. It is this type of "criminal" case, as frequently arising from state prisoners as from those held under federal conviction—technically considered by the courts to be a civil proceeding—that has burgeoned in recent years and control of which is urgently needed. Logically, the rules suggested for criminal appeals by this report are equally appropriate to these cases as well. As a practical matter, they probably cannot now be made applicable and perhaps as a constitutional matter they need not be.[13] However, the achievement of automatic, adequate direct review of convictions should alleviate, to a degree, the problems of sifting and deciding the mounting number of post-conviction claims by federal prisoners.

CONCLUSIONS

In the light of the protracted delays and extensive consumption of time which the present system of handling indigents' appeals requires of bench and bar, it appears reasonable to ask for a different solution, consonant both with constitutional principles of equality before the law and the demands of economy. Since it appears that in a substantial number of cases a direct appeal *in forma pauperis* is ultimately allowed even under the present system, and since the total number of such appeals is not considerable, the most desirable solution appears to be an amendment to existing law so as to afford an appeal with automatic provision of a full transcript, in every criminal case in which a convicted defendant wishes to take a direct appeal.[14] This would be consistent with the suggestion of

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[13] But see *Smith* v. *Bennett*, 365 U.S. 708 (1961). *Cf. United States* v. *Visconti*, 261 F. 2d 215 (2d Cir. 1958).

[14] The amendments need not be extensive, involving primarily a revision of the short basic statute governing all *in forma pauperis* litigation, 28 U.S.C. § 1915, and a few ancillary statutes and rules of procedure, such as 28 U.S.C. § 753 and Rule 39(c) Fed. R. Crim. Proc.

Mr. Justice Stewart, concurring in the *Coppedge* case, that courts of appeals undertake to grant appeals *in forma pauperis* as a matter of course, in order to avoid constitutional difficulties and dissipation of time and energy in preliminary skirmishing.

The approximate cost of such a system is, however, not determinable from existing statistics. Available facts point to costs well under $500,000 per year for all federal criminal cases. It may be desirable to undertake a more detailed study with a view toward ascertaining more precise cost figures and comparing them with the present expense to the government of *in forma pauperis* appeals, making provision for the man-hours spent and to be spent by judges, government attorneys and counsel in preparing the cases and disposing of them. We feel confident that upon mature reflection of the facts, and of the human as well as monetary factors involved, the conclusion will be inescapable that the Uni ed States cannot afford any lesser system and yet adhere to the principle of equal justice under law.

Chart #1

STATISTICS ON CRIMINAL CASES AND APPEALS IN FEDERAL COURTS

from the Annual Report of United States Attorneys, Department of Justice

Fiscal Year	Criminal Cases Terminated	Criminal Defendants Terminated	Pleaded Guilty	Went to Trial	Found not Guilty or Dismissed	Found Guilty	Appeals Terminated			
							For U.S.	Against U.S.	Other	Total
United States:										
1958	29,806	39,174	27,917	4,583	1,330	3,253	409	60	225	694
1959	30,929	40,805	28,624	4,361	1,396	2,965	462	68	252	782
1960	30,462	38,855	27,645	4,683	1,373	3,310	435	41	203	679
1961	30,309	38,857	27,554	4,544	1,355	3,189	396	59	173	628
1962	31,017	39,289	27,733	4,768	1,403	3,365	419	41	202	662
District of Columbia										
1958	1,727	2,247	1,006	549	130	419	94	26	91	211
1959	1,624	2,110	874	490	148	342	147	25	114	286
1960	1,317	1,693	839	402	106	296	113	10	60	183
1961	1,274	1,617	765	455	82	373	84	17	32	133
1962	1,215	1,592	671	514	144	370	78	7	42	127

Chart #2

STATISTICS ON CRIMINAL TRIALS IN FEDERAL COURTS
from the Annual Report of the Director of the Administrative Office of United States Courts

Fiscal Year	Criminal Cases Terminated	Criminal Defendants Terminated	Pleaded guilty or nolo contend.	Found not guilty or dismissed	Found guilty after trial	Length of Trials: under 1 day	1 day	2 days	3 days	over 3 days
United States: 86 districts, not including District of Columbia (prior to 1962), Alaska (prior to 1961), Canal Zone, Guam and Virgin Islands.						United States: All districts				
1958	28,634	34,165	24,256	3,661	2,552	991	1,487	719	290	343
1959	28,424	34,411	24 793	3,696	2,240	622	1,386	684	272	383
1960	29,864	36,349	24,245	03 784	2,483	671	1,393	722	320	409
1961	29,881	36,288	24 830	4,046	3,795	1099	, 819	757	392	411
1962 (preliminary report)	---	36,195	not available	-----	-----	----	-----	---	----	---
District of Columbia:										
1958	1,325	1,714								
1959	1,313	1,705								
1960	1,085	1,401								
1961	1,098	1,377								
1962	----	1,313								

Chart #3

STATISTICS ON CRIMINAL APPEALS IN FEDERAL COURTS
from the Annual report of the Director of the Administrative Office of United States Courts

Fiscal Year	Appeals Terminated	Disposed of without hearing or submission	Affirmed	Dismissed	Reversed	Other	% Reversed	Petitions for cert. filed	Cert. granted
United States: All Circuit Courts of Appeals									
1958	596	148	339	14	93	2	20.8	214	29
1959	633	194	342	9	86	2	19.6	232	23
1960	580	139	348	14	78	1	17.7	253	36
1961	628	180	340	7	96	5	21.4	250	26
1962	622	130	345	8	94	3	20.9	245	19
District of Columbia Circuit									
1958	104	22	66	2	13	1	15.9	59	11
1959	132	40	70	1	19	2	20.7	75	3
1960	120	30	63	4	22	1	24.4	70	5
1961	91	20	57	2	10	2	24.0	72	14
1962	108	22	58	2	15	2	19.5	71	7

Chart #4

STATISTICS ON THE ADMINISTRATION OF MILITARY JUSTICE

From the Annual Reports of the United States Court of Military Appeals, the Judge Advocate General of the Armed Forces and the General Counsel of the Treasury Department

Calendar Year	*General Courts Martial Convened*	*Cases Considered by Boards of Review* [1]	*% Cases Heard by Boards of Review with Appointed Counsel for the Appellants* [2]
1958:			
Army	*	2,447	61.5
Navy	*	4,615	54
Air Force	768	2,331	53
Coast Guard	10	51	*
Total	*	9,444	
1959:			
Army	*	1,853	75.2
Navy	1,064	4,217	*
Air Force	684	1,888	55
Coast Guard	3	53	48
Total	*	8,111	
1960:			
Army	*	1,604	75.2
Navy	805	4,011	*
Air Force	538	1,518	57
Coast Guard	6	26	*
Total	*	7,159	*
1961:			
Army	1,899	1,432	76
Navy	500	3,376	54
Air Force	387	1,195	60
Coast Guard	4	24	*
Total	2,790	6,027	

* Figures not reported.

[1] Cases considered by Boards of Review exceed numbers of general courts martial convened, even though latter figure includes trials at which the defendant was acquitted, since the Boards must also review the results of special courts martial in which a punitive discharge is awarded the accused.

[2] This percentage would roughly correspond to the number of cases heard and considered on the basis of full briefs and oral argument. The remainder, in which counsel was not requested, would be approximately the number of cases disposed of without hearing or submission, corresponding to column 3, chart 3.

Chart #5

A SURVEY OF IN FORMA PAUPERIS APPEALS IN CRIMINAL CASES IN THE FEDERAL COURTS IN FISCAL YEAR 1960

(This survey was conducted through mailed questionnaires addressed to the Chief Judge of each of the United States Courts of Appeals by Bennett Boskey, Esq. of Washington, D.C. in connection with the preparation of his article "The Right to Counsel in Appellate Proceedings," 45 Minn. L. Rev. 783, (1961).)

Circuit	Direct Appeals			Appeals in Collateral Attacks by Federal Prisoners			Total		
	Granted by D.C.	Granted by C.A.	Denied by C.A.	Granted by D.C.	Granted by C.A.	Denied by C.A.	Granted by D.C.	Granted by C.A.	Denied by C.A.
First	*	5	4	*	2	3	*	7	7
Second	*	*	*	*	*	*	*	9	11
Third	a	9[a]	0	a	5[a]	5	8	6	5
Fourth	*	9	2	*	20	14	*	29	16
Fifth	17	5	0	16	7	22	33	12	22
Sixth	*	11	0	*	25	17	*	36	17
Seventh	*	*	*	*	*	*	*	*	*
Eighth	*	4	*	*	*	*	b	63[b]	b
Ninth	b	28[b]	b	b	96[b]	b	b	120[b]	b
Tenth	*	*	*	*	*	*	*	37	14
D. C.	*	13	*	*	9	*	60	24	136

a. Granted by either District Court or Court of Appeals.

b. Total number of cases considered without indication of disposition.